FILE COPY

FILED
SEP 3 - 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949.

No. 311.

VINCENT ANTHONY SORRENTINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID BERGER,
THOMAS D. McBRIDE,
1125 Land Title Building,
Philadelphia 10, Pa.,
Attorneys for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
A. Statement of the Case	2
B. The Questions Presented	6
C. Reasons Relied on for Allowance of the Writ	7
Brief in Support of Petition	11
Argument	11
I. Petitioner Did Not Receive a Public Trial	11
II. The Freedom of the People to Attend Federal Criminal Trials Cannot Be Abridged by the Judge Even With the Consent of the Defendant	15
III. A Conviction Resulting from a Federal Proceeding Which Is Not a Public Trial Is a Nullity	18
IV. The Defendant Never Consented to His Deprivation of a Public Trial	22
V. Fundamental Fairness Requires That Petitioner Be Given a New Trial..	29
Conclusion	30

TABLE OF CASES CITED.

	Page
Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 81 L. Ed. 1177, 57 S. Ct. 809	8
Bateson v. State (Tex. Cr. App.) 80 S. W. 88	15
Cancemi v. People, 18 N. Y. 136	19
Cobb v. People, 84 Ill. 511	15
Daubney v. Cooper, 10 B. & C. 237, 109 Eng. Re. 438	9, 15
Diaz v. U. S., 223 U. S. 442, 32 S. Ct. 250, 56 L. Ed. 500	13
Ellerbe v. State, 75 Miss. 522	15
Eury v. Huff, 141 F. 2d 554 (C. C. A. 4)	27
Ex parte Bain, 121 U. S. 1	19
Ex parte McClusky, 40 Fed. Rep. 40	19
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457	8, 26
Graves v. People, 32 Colo. 127, 2 A. C. 6	15
Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262	11, 13
Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019	25
Kercheval v. U. S., 274 U. S. 220	28
Kobli v. U. S., 172 F. 2d 919 (C. C. A. 3)	21
Krulewitch v. U. S., 93 L. ed. 623	29
Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011	13
McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608	8
O'Brien v. People, 17 Colo. 561	15
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724	8
Re Oliver, 333 U. S. 270, 92 L. ed. 682	18, 20
Patton v. U. S., 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253	8, 27

TABLE OF CASES CITED (Continued).

Page

People ex rel Battista v. Christian, 249 N. Y. at 318 ..... 18, 20, 21
People v. Miles, 289 N. Y. 360 21
Prine v. Commonwealth, 18 Pa. 103 27
State v. Hensley, 75 Ohio St. 255, 79 N. E. 462 ..... 8, 16
State v. Keeler, 52 Mont. 205, 156 P. 1080 ..... 9, 16
State v. Marsh, 126 Wash. 142, 217 P. 705 17
State v. Smith, 90 Mo. 37, 1 S. W. 753 12
State v. Thomas, 128 La. 813, 55 So. 415 12
Territory v. Kelly, 2 N. M. 302 12
Thompson v. People, 144 Ill. 378 15
Turbeville v. State, 56 Miss. 793 15
U. S. v. Colonna, 142 F. 2d 210 (C. C. A. 3) 27
U. S. v. Kobli, 172 F. 2nd 919 (C. C. A. 3) 3, 7, 13, 14, 16
U. S. v. Moe Liss, 105 F. 2d 144 (C. C. A. 2) 28
Von Moltke v. Gillies, 332 U. S. 708, 92 L. Ed. 309, 68 S. Ct. 316 ..... 8, 25, 26
Wade v. State, 207 Ala. 1, 92 So. 101 17
Ward v. Territory of Oklahoma, 8 Okla. 25, 56 Pac. 704 12

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Federal Rules of Criminal Procedure:	
Rule 7 (b)	23
Rule 11	23
Rule 23 (a)	24
Rule 23 (b)	24
Rule 43	13, 24
Rule 44	24
Rule 51	29
Rule 52	30
Mann Act, Sections 2 and 3, 36 Stat. 825, 18 U. S. C. A. Sections 398, 399	1
National Committee on Law Observance and Enforcement, Report on Criminal Procedure, (1931) 17..	11
Notes of Advisory Committee on Rules	13
35 Stat. 1096, 18 U. S. C. A. Section 88	1

IN THE

Supreme Court of the United States

October Term, 1949.

No. .

VINCENT ANTHONY SORRENTINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Vincent Anthony Sorrentino, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Court of Appeals for the Third Circuit, dated July 6, 1949, affirming a judgment of the District Court for the Middle District of Pennsylvania, convicting him of the crimes of conspiracy, 35 Stat. 1096, 18 U. S. C. A. Section 88, and violations of Sections 2 and 3 of the Mann Act, 36 Stat. 825, 18 U. S. C. A. Sections 398, 399, and sentencing him to serve a total of seven years' imprisonment.

On February 11, 1949, after he had served over 15 months of his sentence, the Court of Appeals granted a motion to admit petitioner to bail pending his appeal (4). On July 20, 1949, the time for filing this petition was extended by your Honorable Court to September 3, 1949 (82). Petitioner is now at liberty on bail pending the determination of this petition.

A.
Statement of the Case.

1.

The Government proved that on May 12, 1947, Mary Kovacs Riviello left the home of her aunt, Elizabeth A. Kobli, in Scranton, Pa., in the company of her husband, Samuel Riviello, and Harold E. Schiavo. They traveled by Greyhound Bus Lines to Buffalo, N. Y., where, sometime after arrival, they met with petitioner Sorrentino. After several days in Buffalo, Riviello and Schiavo returned to Scranton. Mrs. Riviello remained, and through Sorrentino's arrangements, engaged in prostitution in Utica, N. Y. She turned over her earnings to Sorrentino alone. Sorrentino neither shared the proceeds with his co-defendants nor communicated in any other way with them after Riviello and Schiavo left Buffalo. Neither did Sorrentino pay for the trip to Buffalo. Schiavo and Riviello, who were also indicted with Kobli and petitioner, pleaded guilty. Kobli and petitioner pleaded not guilty and were convicted. To sustain its burden, the Government introduced numerous hearsay declarations which were admitted over each defendant's objections, on the ground that they were declarations of one co-conspirator made in furtherance of the conspiracy and binding upon the other. The Court of Appeals upheld the admissibility of these declarations and dismissed the challenge to the sufficiency of the evidence (80).

2.

Sorrentino and Kobli were tried jointly on the conspiracy and the substantive counts. Following Kobli's conviction, an appeal was taken, in which after argument, followed by reargument, before the court *en banc,* the Court of Appeals reversed Kobli's conviction upon the ground that she was denied a public trial when the judge at the opening of the trial ordered excluded from the courtroom "all the people except the defendants, their counsel, wit-

nesses and members of the press" (23). See *U. S. v. Kobli*, 172 F. 2nd 919 (C. C. A. 3).

Thereafter, on March 7, 1949, while petitioner's appeal was pending, the Government moved for an order directing the trial judge to file a certificate disclosing the actual happenings at the trial (5) which took place over 15 months before. Over petitioner's objections, the Court of Appeals directed the trial judge to file a certificate "disclosing the physical state of the Courtroom during the trial and the actual happenings therein, so far as such physical state and happenings may bear upon the fact of whether or not the trial of this Appellant in the District Court was open to the public; and was attended by the public" (8).

Pursuant to that order, the trial judge fixed March 16, 1949 for the hearing of "such testimony and argument as the respective parties may desire to present preliminary to and in connection with the filing of the Certificate . . ." (14).

On March 16, 1949, the hearing was held. The Government's witnesses were the Clerk of the District Court, his deputy and two deputies marshal. Petitioner's witnesses were the three lawyers who represented him at the trial.

On April 15, 1949, the trial judge filed a certificate and a transcript of the testimony. He stated that the certificate was based upon the testimony and his independent recollection (9).

In connection with his Supplemental Brief in the Court of Appeals, the pertinent excerpts of the testimony were filed by petitioner as an Appendix, which by stipulation in this Court (83) takes the place of the original transcript of the testimony taken before the District Judge on March 16, 1949.

The trial of petitioner and Kobli began on November 5, 1947. On that day the jury was selected and sworn and various motions were made (33). The taking of testimony began on November 6, 1947, and, with night sessions, con-

tinued until November 8, 1947, when the verdict was rendered (9). The trial judge certified that "In order to provide seating accommodations for the jury panel, an overcrowded court room, outside the bar enclosure, was cleared of all except witnesses and such persons as defense counsel desired to have remain. During the selection of the jury some spectators were present" (9).

The clearing of the courtroom was accomplished by the following order:

> "To the ladies and gentlemen who are in the Courtroom I might say to you there isn't even standing room in the Courtroom at the present time. The jurors are in the other Courtroom. They have taken a recess there and there must be room for the jury. Court notices a great many young girls of tender years in this room. One counsel has objected to the Courtroom being cleared and insists upon a public trial. This Court, in the absence of the jury, feels the nature of this case is such that the Courtroom should be cleared and directs that the Courtroom be cleared of all people except the defendants, their counsel, witnesses and members of the press. The Court officer is directed to clear the Courtroom of all other persons notwithstanding one of counsel objects." (3)

This order which was given wide publicity in the local press[1] was never rescinded or modified "on the record" (66). As a result of the order, the previously "packed" courtroom was cleared, not only of children, but also of adults (42). Thereafter, the jury panel (numbering 54) entered the room (18). Subsequently, at the most 16 people other than prospective jurors were in the room during the first day of the trial (20, 25, 31, 52). Of these, four or five were college students (19, 25) and the rest were witnesses

[1] This is clear from pp. 9a to 11a of the Brief and Appendix filed by the Government in *U. S. v. Kobli*, 172 F. 2d 919 (C. C. A. 3).

(52, 70). So that a maximum of 70 persons were in the courtroom during the afternoon of November 5, 1947. The seating capacity of this courtroom is 96 (16) and with standees its capacity is 150 (16). Hence, about three-quarters of the seats were taken and the room was occupied by less than one-half of its total capacity including persons who could and did stand, as happened in later days of the trial (34, 35, 36). See also trial Judge's certificate (9, 10).

During that part of the trial which occurred on November 5, 1947, the corridor adjacent to the courtroom was crowded with adults (71).

The trial judge also certified that:

> "From the time the taking of testimony commenced, while children of tender years were excluded, all adults who desired to attend the trial were permitted to do so subject to the limitations of the seating space available.
>
> "The number of spectators present increased as the trial progressed, so much so that at the evening session of the first day of taking testimony, and thereafter to the end of the trial, not only all available seating space but, in addition, standing room was occupied by members of the body politic having no connection with the trial other than as spectators.
>
> "From the time of the commencement of taking testimony until the end of the trial no adult who desired admission to the trial was excluded while seating space in the courtroom was available." (9, 10)

According to the original transcript of testimony reflecting the happenings during the first days of the trial, November 5, 1947, the court at the very outset called a sidebar conference of trial counsel and stated (2):

> "At the present time there is not standing room in the Courtroom. There is no room at all for the jury.

> "Do any of the defendants' counsel have any objection to the Court making an order clearing the Courtroom of all people except jurors, witnesses, lawyers and members of the press?"

This question was answered by Kobli's counsel (Mr. McDonnell) in the affirmative on the ground that "I want a trial conducted before the public . . ." (2) but was answered in the negative by petitioner's counsel, one of whom stated that he did not join in the "request" of Kobli's trial counsel (2). The other two counsel stated "no objection" (2).

But, none of petitioner's trial counsel ever had any discussion whatever with petitioner regarding the exclusion of the public from the courtroom or the judge's order to that effect (56, 68). Nor was petitioner ever consulted by the trial judge about not having a public trial. No effort was made by the trial judge to determine whether petitioner consented to his order.

The Court of Appeals held that petitioner did not receive a public trial, but affirmed his conviction on the ground that he had "waived" his right to a public trial (79, 80).

B.

The Questions Presented.

The following four questions arise as a result of the action of the trial court as affirmed by the Court of Appeals:

(1) Is the freedom of the people to attend trials of criminal charges so essential to a trial in a federal court that it cannot be impaired by the judge, even with the defendant's consent?

(2) Can an accused be subjected to a seven year term of imprisonment upon a judgment of conviction resulting from a federal proceeding which is not a public trial within the fundamental requirement of the common law as expressly guaranteed by the 6th Amendment to the United States Constitution?

(3) Assuming *arguendo* that the public's right to attend federal criminal trials can be abridged by the judge with the defendant's consent, has the accused effectively given such consent, where, without even consulting him to determine whether he wished to give up his constitutional right to a public trial, his counsel states there is no objection to the court's action and where the court makes no effort to determine whether there has been an intelligent and competent waiver by the accused of his constitutional right?

(4) Two defendants are tried simultaneously for conspiracy and the same substantive offenses arising out of the same transaction and, after the introduction as statements of one co-conspirator binding upon the other, of masses of hearsay testimony in the form of declarations made out of each other's presence, both defendants are convicted in a proceeding which is not a public trial within the meaning of the 6th Amendment. The conviction of one defendant who objected to the order of the trial judge excluding the general public was set aside. Question: Can the conviction of the other defendant stand merely because his counsel did not vainly object to the judge's action in excluding the public, or does fundamental fairness, the barest minimum requirement of due process, require that the other co-defendant's conviction be set aside and a new trial granted?

C.

Reasons Relied on for Allowance of the Writ.

In the decision sought to be reviewed, the Court of Appeals has decided important questions of federal criminal law in a way conflicting not only with its own decision in *U. S. v. Kobli*, 172 F. 2d 919, but also conflicting with decisions of this Honorable Court and has sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of your Honorable Court's power of supervision under the

rule of *McNabb v. U. S.*, 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608.

The decision sought to be reviewed invades constitutional rights and establishes a dangerous precedent by its holding that the freedom of the public to attend federal criminal trials may be abridged by the judge with the consent of the defendant and by its further holding that the defendant "waived" one of the most fundamental rights protected by the Constitution merely because his counsel failed vainly to object to the court's unconstitutional action or failed to "request" what is expressly guaranteed by the Constitution; although he was never even consulted about the matter by his counsel and although the judge made no effort whatever to determine whether there was in fact an intelligent and competent "waiver" by the accused. The decision runs counter to numerous holdings of this Honorable Court that "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389, 81 L. Ed. 1177, 57 S. Ct. 809; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724": *Glasser v. U. S.*, 315 U. S. 60, 69, 70, 71, 86 L. Ed. 680, 62 S. Ct. 457. See also *Von Moltke v. Gillies,* 332 U. S. 708, 92 L. Ed. 309, 68 S. Ct. 316. It is in plain violation of this Court's ruling in *Patton v. U. S.*, 281 U. S. 276, 74 L. Ed. 854, 50 S. Ct. 253, that there can be no waiver of a constitutional right without the "express and intelligent consent" of the *accused.*

Significantly, the court below cites no federal authority for the proposition that there may be a "waiver" of the requirement that criminal trials must be open to the public. There is no such authority. The State courts are divided on the subject. Petitioner believes, contrary to the court below, that the better reasoned State decisions hold that there can be no abridgment of the peoples' right to attend criminal trials. As stated in *State v. Hensley,* 75

Ohio St. 255, 79 N. E. 462, 463, 464, the people "have the right to know what is being done in their courts, and free observations and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare." And as the Montana Court expressed it, "the people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff and clerk—conduct the public's business." *State v. Keeler*, 52 Mont. 205, 156 P. 1080, 1083.

The Court of Kings' Bench in *Daubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng. Re. 438, 440 has clearly expressed the reason for the common law command that trials must be public:

> ". . . we are all of opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that *all parties who may be desirous of hearing what is going on*, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed,—*have a right to be present for the purpose of hearing what is going on.*" (Emphasis supplied.)

To hold that a defendant may effectively waive a public trial under the circumstances here disclosed is most dangerous. If the holding is allowed to stand it will permit the entire frittering away of the rights not only of the public, but of the accused himself. If, through counsel's failure to interpose a futile record objection, a defendant loses his right to a public trial, what is there to prevent the judge and defense counsel from agreeing to a star-chamber proceeding against the defendant's will? What assurance is there that any trial was had at all? If the public may be removed from the courtroom with impunity so long as the *appellate* court finds the defendant "consented" or "waived" his rights, a "trial" may be had in

which the entire proceedings from beginning to end are totally secret. Whether the defendant in fact "consented" in such a case presumably would be determined by the "record," itself made *in camera* by the very people whose conduct and official action is sought to be reviewed. If the requirement that a criminal trial must be public is capable of waiver, it is submitted that at the very least, nothing short of a clearly expressed, intelligent, voluntary, competent consent given by the defendant himself can suffice. Otherwise, untold aggressions against constitutionally protected liberties can occur under circumstances putting them beyond effective review by this Honorable Court.

Your petitioner, therefore, believes that this application presents a case cognizable by your Honorable Court under the Constitution and Statutes of the United States and the rules of this Honorable Court, and one eminently proper for review.

Wherefore, your petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Court directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: September 2, 1949.

VINCENT ANTHONY SORRENTINO,
Petitioner.

By DAVID BERGER,
THOMAS D. MCBRIDE,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

Petitioner Did Not Receive a Public Trial.

In the court below, the Government argued that Petitioner received a public trial. This was expressly rejected by the Court of Appeals, which held:

> ". . . From the certificate and testimony it appears that the exclusionary order of the trial judge was relaxed on the last three days of the trial but that it was enforced on the first day during which the jury was selected. The Government argues that since the public was admitted on the three days during which testimony was taken the defendant actually had a public trial within the meaning of the Sixth Amendment. The constitutional guarantee, however, applies to the entire trial, including that portion devoted to the selection of the jury. Accordingly it must be held that the defendant's constitutional rights were violated by the enforcement of the exclusionary order on the first day of the trial unless those rights were validly waived by him." (77, 78)

This conclusion of the court below is correct. Every phase of the trial, including the selection, impaneling and swearing of the jury, must be public.

"Trial in our system involves the impaneling of a jury, the presentation of evidence, argument by counsel, and the charge of the court. Then follows the *verdict*, which may find the accused guilty or not guilty." *National Committee on Law Observance and Enforcement, Report on Criminal Procedure,* (1931) 17.

In *Hopt v. Utah,* 110 U. S. 574, 578, 4 S. Ct. 202, 28 L. Ed. 262, Mr. Justice Harlan, speaking for an unanimous

court stated that "The trial commences at least from the time when the work of impanelling the jury begins." The court there held that in the trial of an indictment for a felony the defendant must be personally present when challenges to jurors are tried.

In *State v. Smith,* 90 Mo. 37, 1 S. W. 753, 755, a case also involving the absence of the defendant while the jury were being selected, the court held that "Impaneling and examining the jury is, we think, manifestly a material, substantive, and important step 'during the trial' within the meaning" of the statute.

See also *State v. Thomas,* 128 La. 813, 55 So. 415, where the court reversed a conviction because the defendant was absent while a person called as a juror was being examined on his *voir dire* and when he was challenged by defense counsel. The opinion of the court (55 So. at p. 416) contains the following quotation:

> "In a trial for a felony, the minutes of court must contain the express statement of the presence of the prisoner at every important step of the proceedings; and the swearing and the impaneling of the jury is an important part of the trial. State v. Prater, Man. Unrep. Cas. 307; Whart. Cr. Pl. p. 1, No. 545."

In *Ward v. Territory of Oklahoma,* 8 Okla. 25, 56 Pac. 704, the court held that the impaneling of the jury is an essential part of the trial saying, "A trial in a criminal case begins at the commencement of the impaneling of the jury, and is ended when the jury is discharged, and during every part of the trial of a felony case the defendant must be personally present."

The court in *Territory v. Kelly,* 2 N. M. 302, stated: "Neither can there be any doubt that the calling and examination of jurors to try a cause is a part—and to the prisoner at the bar a very important part—of the proceedings of a trial."

Rule 43 of the Federal Rules of Criminal Procedure specifically adopts this important rule:

> "The defendant shall be present at the arraignment, *at every stage of the trial including the impaneling of the jury* and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." (Emphasis added.)

This rule is but a statement of existing law. *Notes of Advisory Committee on Rules,* citing *Lewis v. U. S.,* 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011; *Diaz v. U. S.,* 223 U. S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500.

While these cases involved the presence of the accused at the trial, the principle is no different when applied to the requirement that the accused be given a public trial. The right of an accused to be present at every stage of his trial is essential to due process of law. *Hopt v. Utah, supra.* The right of the accused to a public trial in the Federal courts is *expressly* guaranteed by the Sixth Amendment.

As Judge Maris stated in *U. S. v. Kobli,* 172 F. 2d at 923, "The apparently idle spectator may turn out to be the one person who directs public attention to acts of judicial oppression which are overlooked by the more seasoned but sometimes blasé professional gatherer of news." The opportunity for judicial oppression is just as great in the selection of a jury, a very important and essential part of his trial (*Lewis v. U. S., supra*) as in other stages of the proceedings against the accused. Indeed, a public trial might well be an empty ritual if the jury could be selected in secret.

It is clear, therefore, that the petitioner was entitled to a public trial from the moment when the jury was impaneled until the jury was discharged.

The important part of petitioner's trial which occurred on November 5, 1947, was not public. The trial began on November 5, 1947, and ended on November 8, 1947. The first afternoon was devoted to the impaneling, selection and

swearing of the jury and to certain motions (33). Whatever may have been the condition thereafter,[2] it is clear beyond any doubt that the first day's proceedings were not conducted publicly. The order clearing the courtroom of all persons except the defendants, their counsel, witnesses and the press was issued that day at the immediate outset of the trial (1-3). It is of no consequence either that four or five students were specially permitted to be present during the first day (19; 25) or that defense counsel were given the right (which they did not exercise) (33-34) to request admission of specific persons "who have any connection with this case" (4). As the Court of Appeals stated in *U. S. v. Kobli*, 172 F. 2d at 924, this offer does not cure the judge's unconstitutional order of exclusion "since the offer was limited to persons whom the defendant might designate and who were connected with the case." Other than the four or five students, the only persons present in addition to the jury panel were witnesses (52; 70). Only three-quarters of the seats were used and less than one-half of the entire capacity of the room was filled (16; 34). Yet, crowds of adults surged outside the courtroom doors while the trial progressed on the first day (71).

Since the trial of the accused must be public at every important stage of the proceedings, it must be concluded that the Court of Appeals correctly held that petitioner did not receive a public trial.

Before the Court of Appeals, counsel for the Government conceded that there was no waiver by the petitioner

[2] According to the trial judge's certificate, all adults who desired to attend the trial were permitted within the limits of the seating space available. It is implicit in the certificate and clear from the record that the courtroom was not filled to capacity until the evening of the first day of taking testimony (9). The reason for this can only be suggested by the publicity given to the order of exclusion which must have kept away the "overflowing" crowd on hand when the trial commenced. See *U. S. v. Kobli*, 172 F. 2d 919.

of his right to a public trial. In view of the contention that the trial was public, it is difficult to understand how the Government could now contend seriously that there was a waiver. It is even more difficult to understand how the court below could in consonance with the principles previously enunciated by this Court, find that there was an effective waiver.

II.

The Freedom of the People to Attend Federal Criminal Trials Cannot Be Abridged by the Judge Even With the Consent of the Defendant.

To dispose of this case in terms of "waiver" is to miss the point. The real question is whether the judge can get together with the parties and hold a criminal trial in a federal court which is not open to the public. Petitioner contends that it is of the very essence of a federal criminal trial that it be held in public. There can be no secret hearing in which the responsibility of a person under the federal criminal laws can be heard and determined. A trial requires a judge. There can be no tribunal, much less a trial without a judge even if the defendant consents to the absence of a judge during part of the proceedings. *Graves v. People,* 32 Colo. 127, 2 A. C. 6; *O'Brien v. People,* 17 Colo. 561. *Cobb v. People,* 84 Ill. 511; *Thompson v. People,* 144 Ill. 378; *Turbeville v. State,* 56 Miss. 793; *Ellerbe v. State,* 75 Miss. 522; *Bateson v. State* (Tex. Cr. App.) 80 S. W. 88. Neither can there be a properly constituted tribunal or a trial when the public is excluded by order of the judge. The English Court of Kings Bench expressed this well, saying in *Daubney v. Cooper,* 10 B. & C. 237, 240, 109 Eng. Re. 438, 440:

> ". . . we are all of opinion that it is one of the essential qualities of a Court of Justice that its proceedings should be public and that *all parties who may be desirous of hearing what is going on,* if there be room in the place for that purpose,—provided they do

not interrupt the proceedings, and provided there is no specific reason why they should be removed,—*have a right to be present for the purpose of hearing what is going on.*" (Emphasis supplied.)

In *U. S. v. Kobli*, 172 F. 2d at 924, the court below concurred and quoted these exact words. The court below also viewed the question before it in the *Kobli* case as one of *judicial power*, saying,

". . . In other words, *did the trial judge have power* to exclude all members of the public except those having special concern with the trial or should his order of exclusion have been limited to those persons or classes of persons who should not for proper and specific reasons have been permitted to attend, leaving the courtroom door open for all other members of the public who desired to attend and for whom there were seats available in the courtroom?" (Emphasis added.)

Other courts have expressly held that the requirement of public trial is jurisdictional in nature. In *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, the court held that the requirement of a public trial is not only for the benefit of the accused, but is also a safeguard of the general public. The people "have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to the public welfare." 79 N. E. at 463, 464. Based on this reasoning, the court held that ". . . it is manifest that the order of exclusion made by the trial judge *was in excess of the power of the court in the premises.*" (Emphasis added.) 79 N. E. at 463. Hence it was of no consequence that the defendant failed to object or except to the order of exclusion.

In *State v. Keeler*, 52 Mont. 205, 156 P. 1080, the court reversed the conviction for lack of a public trial where

the order excluded all persons except the court officers, attorneys, doctors and reporters. The opinion refers to the fact that the provision for a public trial has been held by certain courts to be for the personal benefit of the accused. But the court implicitly rejects that view saying:

> "In our judgment, the purpose of this constitutional provision is threefold. Primarily it is for the benefit of the accused—to afford him the means of proving a fact with reference to some question of procedure which it might be necessary for him to prove in order to protect his rights, and to see that he is not unjustly condemned. . . . But it likewise involves questions of public interest and concern. The people are interested in knowing, and have the right to know, how their servants—the judge, county attorney, sheriff and clerk—conduct the public's business. As was said by the Supreme Court of California: 'In this country it is a first principle that the people have the right to know what is done in their courts'. In re Shortridge, 99 Cal. 529, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78. 'The right to have the courts open is the right of the public.' State v. Copp, 15 N. H. 212.
>
> "But the public is interested in every criminal trial that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end. Cooley's Const. Limitations (2nd Ed.) 441." 156 P. at 1083, 1084.

Wade v. State, 207 Ala. 1, 92 So. 101, vigorously rejects the argument that a public trial may be waived and holds that failure to object to an order clearing the courtroom does not deprive the accused of his constitutional right to a public trial. See also *State v. Marsh,* 126 Wash. 142, 217 P. 705.

It is submitted that these decisions are correct and in accord with the reasons for the "constitutional and statutory commands that an accused be given a public trial" as expressed in *Re Oliver*, 333 U. S. 270-272, 92 L. ed. 682.

III.

A Conviction Resulting from a Federal Proceeding Which Is Not a Public Trial Is a Nullity.

From the above authorities, it must be concluded that an essential element of a trial is that it be open to the general public at large. In this sense, the publicity of the proceedings is as essential to a trial as is the presence of the judge. A conviction resulting from a trial conducted in the absence of the judge would certainly be held a nullity. As already pointed out many state cases have so held and have decided that the fact that defendant or his counsel has consented to the absence of the judge is of no consequence.

In *People ex rel Battista v. Christian*, 249 N. Y. 314, 320, the New York Court of Appeals held that the constitutional requirement that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, could not be waived, stating:

> "Consent cannot give a court jurisdiction or authorize a substantial change in its fundamental mode of proceeding. (*People v. Guidici*, 100 N. Y. 503, 508.) A prerequisite to try for crime is a duly organized court. (*People v. Schmidt*, 216 N. Y. 324, 342, 343.) Examine the principle of *Hopt v. Utah* (110 U. S. 574). A defendant charged with murder was absent during that part of his trial when six jurors were challenged by his counsel for actual bias. When later the defendant was present at the trial, he failed to object to these jurors' retirement to the deliberations of the jury room. He could not waive his rights. The stat-

ute of Utah deemed it essential for the protection of one whose life or liberty is involved in a prosecution for felony to be personally present at every stage of the trial when his substantial rights might be affected."

In *Ex parte Bain*, 121 U. S. 1, an order of the court was entered amending the body of an indictment which had been filed in the court by the striking out of certain immaterial surplusage. The defendant was convicted and following his conviction and imprisonment, a petition for writ of habeas corpus was presented and allowed. This Court held that the requirement of an indictment was a "prerequisite to a prisoner's trial for a crime" and that it was jurisdictional in nature. The prisoner was released on *habeas corpus*. See also *Ex parte McClusky*, 40 Fed. Rep. 40, 71, where the defendant was held incapable of waiving a constitutional right which is essential to jurisdiction; the right in that case being freedom from answering for capital or infamous crime except upon an indictment. In referring to *Cancemi v. People*, 18 N. Y. 136, Circuit Court Judge Parker in *Ex parte McClusky, supra*, 40 Fed. Rep. at p. 75 said:

"The above decision most clearly declares the law governing a case where a fundamental right of the citizen is to be affected by a criminal proceeding, such right being one regulating the method of that proceeding. Mr. Blackstone (4 Comm. 189) says: 'The king has an interest in the preservation of all his subjects.' In this country the state and the law have such a great interest in the life and liberty of the citizen as to see to it that such life or liberty shall not be taken away, even with the consent of the citizen, in violation of one of the great constitutional fundamental requisites regulating the method to be adopted to deprive the citizen of his life or his liberty. Mr. Blackstone (1 Comm. 133) again declares that the 'natural life, being an immediate donation of the Great Creator, cannot

legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow-creatures, merely upon their own authority.' So it is with the liberty of the citizen. It is a donation of the Great Creator, and cannot be taken by persons upon their own authority, even with the consent of the citizen, whose liberty is taken; but it must be taken by due process of law. None of the fundamental requisites to the proceeding, which make up due process of law, can be so waived as to deprive the person whose liberty is taken from him of afterwards resorting to legal means to obtain his liberty."

Surely the requirement that a trial be public is at least as fundamental and important and as essential to due process (*Re Oliver*, 333 U. S. at 272) as that demanding the use of an indictment. As Judge O'Brien stated in *People ex rel Battista v. Christian*, 249 N. Y. at 318, 319:

"Many judicial opinions can be found in which declarations are made that constitutional rights and privileges may be waived. Most of these expressions occur in civil actions (*Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 447, 453; *Mayor, etc., v. Manhattan Ry. Co.*, 143 N. Y. 1, 26; *People ex rel. McLaughlin v. Police Comrs.*, 174 N. Y. 450, 456), but some also appear in criminal cases (*Pierson v. People*, 79 N. Y. 424, 429; *Diaz v. U. S.*, 223 U. S. 442; *People v. Gowasky*, 244 N. Y. 451, 463.) From this mass of opinions and decisions, the rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, is binding upon the individual and cannot be disregarded by him. The public policy of the State as expressed in the Constitu-

tion, takes precedence over his personal wish or convenience."

The New York Court of Appeals recently reaffirmed the rule of the *Battista* case in *People v. Miles*, 289 N. Y. 360. In that case, during trial, counsel for the defendant consented to the amendment of the indictment by the adding of a fifth count. After a conviction an appeal was taken and the Court of Appeals reversed the New York Supreme Court, stating (at 363, 364):

> "Nor did the consent by the appellant's trial counsel serve as a waiver of the appellant's rights and thus deprive him of his right thereafter to challenge the practice which had led to his conviction—though but for such consent the court might well have refused to adopt that practice and at the trial might have vindicated the right of the appellant which has since been asserted only in the appellate courts. '• • • waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result • • • In criminal prosecutions are involved public wrongs and public rights. The State has an interest in the lives and liberties of all within its boundaries even though some may be criminal. Accordingly, prosecutions must be conducted in substance and without essential change as the Constitution commands. A conviction otherwise obtained is a nullity.' (*People ex rel. Battista v. Christian*, 249 N. Y. 314, 318, 319.)"

It is clear, therefore, that when the Judge presiding at petitioners' trial excluded the general public from the courtroom so that the proceeding was not a public trial (*Kobli v. U. S.* 172 F. 2d 919 (C. C. A. 3)), the court exceeded its power. Irrespective of any consent by the defendant or his counsel, the petitioner's resulting conviction is a nullity.

IV.

The Defendant Never Consented to his Deprivation of a Public Trial.

The Court of Appeals held that the order entered by the trial judge was a denial of a public trial to the petitioner but concluded that he had "waived" his right to a public trial "by the action of defendant Sorrentino's counsel (79). In reaching this conclusion, the court below misapprehended the facts as established in the record. The court stated (79):

> "When the trial opened the trial judge asked whether any of the defendants' counsel would object to a court order clearing the courtroom of all people except jurors, witnesses, lawyers and members of the press. Immediately thereafter one of the counsel for defendant Kobli objected and stated that he desired a trial conducted before the public and his request was joined in by his co-counsel. On the other hand each of the three lawyers representing defendant Sorrentino stated to the court that they did not join in the request of defendant Kobli's counsel and that they had no objection to the order which the court proposed to make. The trial judge then announced his order of exclusion."

However, the record shows that only one of the defendant's three trial counsel stated "I do not join" in response to the court's question "Now, Mr. Jenkins?" (2) This question followed a previous question to one of Kobli's trial counsel, "Mr. Tedesco, you join in that request?" (2) Petitioner's other two counsel merely stated "No objection" (2).

But apart from the phraseology used by petitioner's counsel, the court below overlooks the three most important facts with respect to the circumstances in connection with the alleged waiver. These are (a) that the trial judge at no time made any effort to determine whether the de-

fendant himself consented to the waiver of this basic fundamental constitutional right; (b) that the defendant was not even consulted by his trial counsel with respect either to the proposed order of exclusion, the actual order of exclusion, or to his being tried in a proceeding which was not open to the public (56, 68); and (c) the basic purpose of an objection—to call the error to the court's attention—was satisfied by the objections interposed by the alleged co-conspirator's counsel. Petitioner contends that to hold that under these circumstances there was a waiver of the basic fundamental constitutional right is not only to create a new and dangerous precedent which conflicts with the principles previously enunciated by this Court, but also to depart from the customary trial procedure in a shocking manner.

It is significant that the Federal Rules of Criminal Procedure make no provision for waiver of a public trial. There are the following provisions for waiver of procedural rights by defendants:

(1) *Waiver of Indictment.* See Rule 7 (b) [3]

(2) *Plea of Guilty.* See Rule 11 [4]

---

[3] Rule 7 (b) provides: "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."

[4] Rule 11 provides: "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

(3) *Waiver of Jury Trial.* See Rule 23 (a) [5]

(4) *Waiver of Trial by a Jury of Twelve.* See Rule 23 (b) [6]

(5) *Absence of Defendant.* See Rule 43 [7]

(6) *Right to Counsel.* See Rule 44 [8]

The fact that the Rules do not provide for waiver by a defendant of his right to a public trial, leads to the conclusion that the draftsmen did not believe that this procedural requirement was capable of waiver; or that if it

---

[5] Rule 23 (a) provides: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

[6] Rule 23 (b) provides: "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

[7] Rule 43 provides: "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

[8] Rule 44 provides: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

were constitutionally possible to dispense with it by consent of the accused, *as a matter of policy, federal courts should not permit waivers of public trials.*

But in any event, it is clear from a mere reading of the various provisions for waivers that in each instance a weighty duty is imposed upon the judge to ascertain that the defendant clearly understands what it is that he is "waiving"; that he fully comprehends the particular right involved and that he voluntarily and intelligently consents to the relinquishment or abandonment of this known right. Nowhere do the Rules sanction a mere perfunctory "waiver" by the accused. And certainly the Rules do not sanction a waiver of a fundamental, constitutional right by "action of trial counsel" or by silence or inaction on the part of the defendant. This Court in speaking about the waiver of the right to counsel, stated "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson v. Zerbst,* 304 U. S. 458, 465, 82 L. Ed. 1461, 58 S. Ct. 1019. See also *Von Moltke v. Gillies,* 332 U. S. 708, 723, 724, 92 L. Ed. 304, 68 S. Ct. 323 where Mr. Justice Black stated:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a pene-

trating and comprehensive examination of all the circumstances under which such a plea is tendered.

"This case graphically illustrates that a mere routine injuiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel."

Whatever the differences of opinion were with respect to the facts in the *Von Moltke* case, there was complete unanimity in the principle that before a defendant can be held to have waived a basic constitutional right, the trial judge must ascertain that the accused has freely, intelligently and knowingly consented to the procedure. See also *Glasser v. U. S.*, 315 U. S. 69, 70, 71, 86 L. Ed. 699, 62 S. Ct. 457, where this Court stated:

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U. S. 389, 81 L. ed. 1177, 57 S. Ct. 809; *Ohio Bell Teleph. Co. v. Public Utilities Commission,* 301 U. S. 292, 81 L. ed. 1093, 57 S. Ct. 724. Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. We are told that since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. Johnson v. Zerbst, 304 U. S. 458, 464, 82 L. ed. 1461, 1466, 58 S. Ct. 1019. But it is by no means conclusive.

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to reserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty *'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.' Patton v. United States,* 281 U. S. 276, 312, 313, 74 L. ed. 854, 869, 870, 50 S. Ct. 253, 70 A. L. R. 263."

In the *Patton* case, although this Court rejected the contention that trial by a jury of twelve cannot be waived, it strongly cautioned that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition *to the express and intelligent consent of the defendant.*" (Emphasis added.) (281 U. S. at 312.) The defendant *expressly consented* to the finish of the trial with but 11 jurors in the *Patton* case. *Cf. Prine v. Commonwealth,* 18 Pa. 103.

The court below cites three cases as authority for the proposition that the action of the defendant's counsel constitutes a consent by the accused to the exclusion of the public from his trial. However, not one of these decisions is analogous. In *Eury v. Huff,* 141 F. 2d 554 (C. C. A. 4) the court was considering a writ of habeas corpus sought by a prisoner on the ground that the jury which convicted him was composed of only ten men. As Judge Parker stated (141 F. 2d at 555): "But it appears that his attorney agreed to waive the constitutional requirement and proceed with a jury of ten and *that petitioner himself agreed to this.*" (Emphasis added.) In *U. S. v. Colonna,* 142 F. 2d 210 (C. C. A. 3), the only question before the court was, "Was there an abuse of discretion by the trial court in denying the motion of the defendant-appellant, Colonna,

for leave to withdraw his pleas of guilty?" In answering this question negatively, the Court of Appeals quoted from *Kercheval v. U. S.*, 274 U. S. 220, 223, "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." And the Court of Appeals further stated: "The courts have been especially careful to ascertain whether the plea of guilty was freely and understandingly made." 142 F. 2d 210, 212. The court then examined the record and *found that the defendant himself pleaded guilty and stated that he understood the plea.* In *U. S. v. Moe Liss,* 105 F. 2d 144 (C. C. A. 2) there was again presented the question of a plea of guilty. There, while not asked directly whether he pleaded guilty, the defendant took the stand and admitted guilt under one count. His counsel told the jury that the defendant was guilty of that count and he told the judge the defendant pleaded guilty to that count. The circumstances were such that the Court of Appeals said, "The appellant could not have misunderstood the significance of what was taking place." 105 F. 2d at 145.

It is extremely doubtful whether the procedure sanctioned in *U. S. v. Moe Liss, supra,* would be affirmed today in the light of the explicit requirement of Rule 11 of the Rules of Criminal Procedure, that the court "shall not accept the plea without first determining that the plea is made voluntarily with the understanding of the nature of the charge." It would seem that Rule 11 was promulgated to prevent repetition of the loose procedure followed by the trial judge in the *Liss* case. In any event, not one of the three cases cited by the court below remotely supports the proposition that a defendant has waived his basic constitutional right to a public trial simply because his counsel did not vainly object to the order excluding the public from the courtroom and because the defendant remained silent; particularly where the judge made no inquiry at all as to whether there was an intelligent, voluntary waiver and

where the defendant's counsel did not even consult with him on the subject.

Reason and authority support the opposite conclusion.

V.

Fundamental Fairness Requires That Petitioner Be Given a New Trial.

The Government's proof against both Kobli and Sorrentino consisted in the main of masses of hearsay declarations which were not made in the presence of each other. On the theory that declarations of one co-conspirator in the furtherance of the conspiracy are binding upon the other, all of these were admitted over the objection of defense counsel. Kobli and Sorrentino were tried simultaneously. Their criminal responsibility was determined simultaneously. There can be no doubt that the guilt of each was predicated upon the guilt of the other.[9] Cf. *Krulewitch v. U. S.*, 93 L. ed. 623, concurring opinion of Mr. Justice Jackson. Kobli's conviction has been set aside on the ground that the proceeding in which it resulted was not a public trial. Yet the petitioner, convicted in the very same proceeding which is again held not a public trial, is subjected to a seven year term of imprisonment. This shocking result in itself demands correction. Petitioner contends that his imprisonment is no more the result of due process than was his alleged co-conspirator's imprisonment. Kobli did not receive a public trial and for that reason her conviction could not stand. For the same reason, petitioner's conviction should be set aside. Kobli's counsel clearly brought the error in the court's proposed exclusionary order to the attention of the judge. So that there is no basis for contending that the judge was unaware of the position taken by counsel for the defense. Cf. Rule 51 of the Rules of Criminal Procedure. Even had no objection been

[9] Even the substantive convictions rest upon the conspiracy conviction under the *Pinkerton* rule. (See pp. 8 and 9 of the Government's brief in the court below.)

made by any trial counsel this court could now recognize the admitted defect in the trial which so clearly affects substantial rights. Rule 52 of the Rules of Criminal Procedure. To refuse to do because of an insistence on compliance with the empty ritual of interposing an "objection" would be to sweep aside basic rights reaching constitutional dignity by rote rather than reason.

CONCLUSION.

In the last analysis the decision sought to be reviewed shockingly sanctions a radical departure by the lower court from the accepted and usual course of judicial proceedings. It permits the frittering away of a real and substantial right guaranteed not merely to the defendant but to the public at large. By its holding that the accused waives a basic, constitutional right simply because he does nothing while his counsel fails vainly to object to an order depriving him of such fundamental right, it sweeps away the safeguards and protective duties heretofore imposed upon trial judges in the federal courts. It makes the failure to interpose a formal objection on the record, when such an objection as shown by the action of the trial judge in the very case would have been a completely vain thing, the determinative factor in concluding that the essential quality of a public trial guaranteed by the Constitution may be dispensed with by a federal judge. It sanctions a procedure which is inherently dangerous. It requires a defendant to risk offending the trial judge by "requesting" that which is constitutionally guaranteed and which the judge should be solicitous to protect.

Moreover, if the trial judge and counsel may together dispose of a defendant's right to public trial, what is there to prevent the entire proceedings from beginning to end being held in secret? The very question of whether consent was given to the procedure would itself have to be determined by reference to a so-called "record" made up by individuals completely under the control of the judge and

officials whose possible oppressive conduct is the basic reason for the protection of a public trial.

On the other hand, there is a further danger to the rights of the public in permitting a public trial to be waived by the defendant. Cases may arise where the defendant, counsel and all persons concerned would prefer that the public hear nothing whatsoever of the matter. To permit a trial from which the public is excluded merely because the defendant "consented" to it would make possible serious abuses and transgressions against not only the rights of the accused, but also those of the public.

To uphold the action of the court below permits the shocking anomaly that one defendant's conviction as a conspirator is swept aside because it resulted from a proceeding which was not a public trial, whereas another defendant's conviction as a conspirator resulting from the very same proceeding is enforced. Such judicial action does not make for equal protection under the laws, nor for due process. It is submitted that in the interest of basic fairness, the minimum requirement of due process, petitioner's conviction should be set aside.

Respectfully submitted,

David Berger,
Thomas D. McBride,
Attorneys for Petitioner.